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No. 87-1094 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,

Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and EDWIN MEESE III, ATTORNEY GENERAL,

Respondents.

OLIVER L. NORTH,

Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with long-established principles of equity and ripeness, entertain a pre-indictment civil action seeking injunctive and declaratory relief against the investigative activities of a federal prosecutor and grand jury?

2. Whether this Court should address the procedural problems presented by such a civil action where the underlying substantive issue has since been resolved in another proceeding?

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---

BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

Lawrence E. Walsh, Independent Counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit which rejected petitioner's attempt to halt an on-

going grand jury investigation by bringing collateral civil actions (Pet. App. A).[1] As described below, the decision of the court of appeals follows long-standing precedents in which the courts have declined to exercise their equitable powers to interrupt criminal investigations in advance of indictments.

STATEMENT OF THE CASE

A. The Appointment of Independent Counsel

On November 25, 1986, President Reagan announced that the preceding Friday, after becoming concerned as to whether the national security apparatus had provided him with a complete factual record respecting the implementation of his policy toward Iran, he had directed Attorney General Edwin Meese III to conduct a review of the matter over the weekend. 22 Weekly Comp. Pres. Doc. 1604 (1986). The President further stated that he had concluded that certain activities undertaken in this connection raised "serious questions of propriety." *Id.*

On December 2, 1986, one week after the initial announcement of the Justice Department's investigation, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division"). In his application to the Special Division, the Attorney General expressly stated that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c), which provides for the appointment of an Independent Counsel "if the Attorney General determines that investigation . . . by the Attorney General or other

[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.", respectively.

officer of the Department of Justice may result in a personal, financial, or political conflict of interest."

On December 19, 1986, the Special Division filed an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As requested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by petitioner North, other United States Government officials, and individuals acting in concert with them. On December 19, 1986, Mr. Walsh accepted his appointment and began his investigation.

B. The Attorney General's Parallel Appointment of Independent Counsel

On March 5, 1987, after petitioner had brought the first of the two civil actions that are the subjects of this petition (as described below), Attorney General Meese issued a regulation, 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. 52 Fed. Reg. 7270 (March 10, 1987), 9241 (March 23, 1987).

The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271. He emphasized that the regulation was "not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71. As the Department of Justice stated in its brief in this case in the district court, under the Attorney General's regulation Independent Counsel possesses the full authority

conferred by his court appointment. *See* Attorney General's Reply Memorandum in Support of Attorney General's Motion to Dismiss at 8, *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987). The Attorney General's regulation confirmed in the same terms as the Independent Counsel statute and the court order the nature and scope of Independent Counsel's authority, his independence, the limitations on his removal, and the scope of his investigation.[2]

C. North's Two Civil Actions Seeking to Enjoin Independent Counsel's Investigation

On February 24, 1987, less than one month after the grand jury was empaneled in this matter, petitioner brought his first action for declaratory and injunctive relief. *North v. Walsh*, D.D.C., Civil Action No. 87-0457 ("*North I*"). He asserted that the Independent Counsel provisions of the Ethics in Government Act were unconstitutional, and sought nothing less than to halt the entire investigation of the Iran/Contra matter by Independent Counsel. Petitioner demanded the following relief:

> "1. That this Court issue judgment declaring that the independent counsel provisions of the Act violate the Constitution of the United States.
>
> 2. That this Court issue judgment declaring that the appointment of Mr. Walsh as independent counsel under the Act violates the Constitution of the United States.
>
> 3. That this Court issue judgment declaring that each and every appointment by Mr. Walsh of

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[2] *Compare* 28 C.F.R. § 600.1 (Authority and duties of an Independent Counsel) *with* 28 U.S.C. § 594 (same), *and compare* 28 C.F.R. § 601.1 (Jurisdiction of the Independent Counsel: Iran/Contra) *with* December 19, 1986 Order, pp. 1-3 (same).

associate counsel violates the Constitution of the United States.

4. That this Court issue judgment declaring that each and every act of the independent counsel and his staff taken in the name of the United States, or otherwise in furtherance of the division of the court's Order of December 19, 1986, is unconstitutional.

5. That this Court issue judgment declaring that the provision of assistance to the independent counsel and his staff, by defendant Meese and the Department of Justice, in the form of resources and personnel of said Department, is unconstitutional.

6. That this Court enjoin and restrain defendant Walsh from exercising any and all of the authority and power conferred upon him by the division of the court pursuant to the Act.

7. That this Court enjoin and restrain defendant Walsh and anyone acting on his behalf, or on behalf of the Office of Independent Counsel, from purporting to exercise, exercising or seeking to exercise any power or authority of the United States or of the Department of Justice in furtherance of the independent counsel provisions of the Act.

8. That this Court enjoin and restrain defendant Meese, the Department of Justice, and any officer, employee or agent thereof from assisting the independent counsel or anyone acting on his behalf in any manner authorized by the Act.

9. That this Court grant such other and further relief as it deems just and appropriate."

North I, Complaint and Request for Injunction (Pet. App. 40a-41a).

Eleven days after filing his first civil action, on the day following the Attorney General's parallel appoint-

ment of Independent Counsel, petitioner filed a second complaint. *North v. Meese*, D.D.C., Civil Action No. 87-0626 (*"North II"*). He now contended that the Attorney General's appointment of Mr. Walsh as Independent Counsel under the regulation violated the Constitution and laws of the United States, and sought similarly broad relief. *See* Complaint and Request for Injunction, *North II* (Pet. App. 42a-56a). In *North I*, petitioner objected to the court appointment and statutory authorization of an Independent Counsel, but claimed that Executive appointment of an Independent Counsel would be appropriate. In *North II*, petitioner objected to the Executive appointment of an Independent Counsel.

On March 12, 1987, the district court dismissed both of petitioner's complaints, concluding that North's pre-indictment challenges were premature and that he, "like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered." *North v. Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (emphasis in original) (Pet. App. 5a, 23a). On October 1, 1987, the court of appeals summarily affirmed that decision, holding unanimously that petitioner "has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action . . . [P]otential criminal defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *North v. Walsh*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (*per curiam*) (quotation omitted) (Pet. App. 4a).

The petition for certiorari herein was filed on December 30, 1987, the last day permitted under this Court's rules. In the meantime, as described below, the underlying substantive issue which petitioner attempted to raise in these civil actions has since been resolved against him in another proceeding.

D. North's Subsequent Attack Upon the Authority of Independent Counsel

On April 7, 1987, petitioner North was served with a grand jury subpoena calling for certain unprivileged information. North refused to produce the requested information and was held in civil contempt. On July 10, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia upheld the authority of Independent Counsel under the Attorney General's regulation, and found it unnecessary to reach the constitutionality of the Independent Counsel statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987).

On August 20, 1987, a panel of the court of appeals affirmed the order of the district court in an opinion by Circuit Judge D. H. Ginsburg. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, No. 87-869 (U.S. Jan. 19, 1988). All three judges agreed that Independent Counsel and his subordinates have legal authority to pursue the investigation in the Iran/Contra matter under the Attorney General's regulation. Rehearing *en banc* was unanimously denied by the court of appeals on October 23, 1987. North filed a petition for a writ of certiorari, which was denied by this Court on January 19, 1988. *North v. Walsh*, No. 87-869.

REASONS FOR DENYING THE WRIT

The actions whose dismissal gave rise to this petition were collateral civil actions attempting to halt the criminal investigation by the grand jury and Independent Counsel in the Iran/Contra matter. As such, these actions conflicted with fundamental principles which have repeatedly been reaffirmed by this Court. First, equitable principles bar the granting of injunctive or declaratory relief against criminal investigations and prosecutions, except in extraordinary circumstances not found

here. Second, this Court has repeatedly refused to permit collateral attacks upon ongoing criminal investigations at the pre-indictment stage. Thus, the decisions of the courts below are fully consistent with the decisions of this Court. There is no conflict in the circuits justifying review by this Court.

Finally, the underlying issue in this case—the authority of Independent Counsel to conduct his investigation of the Iran/Contra matter—has now been resolved. Even if petitioner's pre-indictment civil complaints were otherwise appropriate, the courts have now foreclosed the substantive relief he seeks. For all of these reasons, this Court should decline to review this matter.

I. PETITIONER'S CIVIL ACTIONS WERE PROPERLY DISMISSED AS IMPERMISSIBLE COLLATERAL ATTEMPTS TO ENJOIN AN ONGOING CRIMINAL INVESTIGATION

Petitioner admits that "this Court in recent years has cautioned restraint in federal court interference, through injunctive relief, with pending state criminal prosecutions" (Pet. 11-12). Indeed, as described below, this Court has long held that state law enforcement efforts may be enjoined or declared unconstitutional only in "extraordinary circumstances," that is, where the law enforcement activities create a threat of irreparable injury that is "great and immediate," and have been conducted in bad faith or for purposes of harassment. No lesser restriction on judicial power should apply where federal criminal investigative activities are concerned. Since no "extraordinary circumstances" can be found on the facts of this case, a remand is neither necessary nor appropriate.

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law" and will not

suffer irreparable injury if denied equitable relief. *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1525 (1987), *quoting Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger*, 401 U.S. at 44. Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution. *Kugler v. Helfant*, 421 U.S. 117, 123 (1975) (citation omitted). *See also Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is available "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances").

This Court has also recognized the importance of judicial restraint where federal courts are asked to enjoin or declare unconstitutional state law enforcement practices, even though no criminal prosecutions are pending. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 112 1983); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976). Thus, in *Rizzo*, the Court held that a federal court abused its equitable discretion in directing a police department to revise its police manuals and procedures for handling complaints of minority citizens, noting that "principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances," 423 U.S. at 379, and that "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint." *Id.* at 379-80, *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

A similar restraint on the federal judiciary's exercise of its equitable powers has been recognized where federal criminal investigations are concerned.[3] Thus the lower federal courts, applying the principles enunciated by this Court, have held that, to the extent challenges to federal criminal investigative activities are justiciable at all, such activities may be enjoined or declared unconstitutional only in the most "extraordinary circumstances." *See e.g., Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche v. Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); *see also Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964).

No such "extraordinary circumstances," as defiined by this Court, are presented by the facts of this case. Petitioner has not shown the necessary "great and immediate" irreparable injury. Nor has he suggested that the investigation was conducted in "bad faith," for purposes of "harassment," or in flagrant and patent violation of express constitutional prohibitions. *See Younger*, 401 U.S. at 46, 53-54; *see also Lyons*, 461 U.S. at 112. Indeed, the *Younger* Court explicitly noted that:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend

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[3] Petitioner's assertion that *Younger* principally concerns federal-state relations (Pet. 12, 13) is inconsistent with this Court's interpretation of that decision. The Court has recently made clear that the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity . . . should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law.'" *Pennzoil Co.*, 107 S. Ct. at 1525, *quoting Younger*, 401 U.S. at 43. Principles of comity and federalism were a "second explanation," *Pennzoil Co.*, 107 S. Ct. at 1525, that only "reinforced" the "underlying reason" for judicial restraint. *Younger*, 401 U.S. at 44.

> against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, *the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.*"

401 U.S. at 46 (citation omitted; emphasis added). Here petitioner must concede that the worst that can happen to him as a result of the Independent Counsel statute and regulation which he regards as unconstitutional is that he would be indicted. Accordingly, petitioner here is in precisely the situation designated by the Court as insufficient to constitute an "irreparable injury." [4]

Moreover, petitioner's fundamental misreading of *Younger* and its progeny underlines that any purported "conflict" in the Circuits is illusory. The decisions invoked by petitioner (Pet. 6-11), *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *cert. granted*, 107 S. Ct. 1885 (1987), *vacated and remanded as moot*, 108 S. Ct. 52 (1987), and *Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987), concerned issues fundamentally different from those involved in the instant case and in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) (Pet. App. 70a).

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[4] *Steffel v. Thompson*, 415 U.S. 452 (1974), relied upon by petitioner (Pet. 11-16), is not to the contrary. In *Steffel*, the Court held that a declaratory judgment action was permissible to test the constitutionality of a statute under which the plaintiff faced a "genuine threat" of prosecution. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977). *Steffel* allowed litigants to steer "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462. Here, petitioner does not claim that he may have violated the Independent Counsel provisions of the Ethics in Government Act or the Attorney General's independent counsel regulation, and he does not claim that he has foregone any arguably constitutionally protected activity because of these laws. Accordingly, *Steffel* is of no aid to petitioner in seeking a declaratory judgment on the validity of these laws.

Olagues was a class action in which a group of Chinese and Hispanic Americans challenged a federal vote fraud investigation of foreign-born voters who requested bilingual ballots. There the Ninth Circuit adopted the plaintiffs' contention that "such a classification must be subjected to strict scrutiny under equal protection clause analysis because it discriminates on the basis of language, race, and national origin." *Olagues*, 797 F.2d at 1520. In *Smith v. Meese*, 821 F.2d 1484, 1489 (11th Cir. 1987), the court reversed the dismissal of a challenge by a group of black voters and elected officials to an allegedly discriminatory pattern and policy of federal vote fraud investigations, on the ground that this "policy and pattern of investigatory and prosecutory decisions . . . ha[d] the effect of depriving [plaintiffs] of their constitutional rights to vote and to associate freely."

Both *Olagues* and *Smith* involved First Amendment and equal protection challenges to alleged patterns of prosecutorial discrimination. As such, they are consistent with the observation of the *Deaver* court that "in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings *only* where the threatened prosecution chilled the exercise of First Amendment rights." *Deaver*, 822 F.2d at 69 (Pet. App. 70a, 77a) (citing, *inter alia*, *Steffel v. Thompson*, 415 U.S. 452 (1974); emphasis added). Petitioner here, in contrast, does not even make a First Amendment or equal protection claim. The *Smith* court explicitly noted the important difference between a class action to protect group rights and an individual attempt to escape criminal investigation or prosecution:

> "It is important to note that the plaintiffs in this case are not attempting to have the federal judiciary review individual decisions to investigate or prosecute anyone. . . . We are not asked to block or require the prosecution of any individual; instead, the plaintiffs have asked the federal court to order the

> defendants to stop following a deliberate policy of discriminatory investigations and prosecutions."

Smith, 821 F.2d at 1490 (footnotes omitted). Thus, petitioner is seeking precisely the relief that the *Smith* court explicitly—and the *Olagues* court implicitly—distinguished from the situations that were before the District of Columbia Circuit in this case and in *Deaver*.

Finally, it must be noted that petitioner seeks nothing less than to enjoin a grand jury proceeding. This Court has repeatedly recognized that an essential part of fair and expeditious law enforcement is the grand jury investigation, the purpose of which is "to determine whether a crime has been committed and whether criminal proceedings should be instituted." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). To ensure that grand juries are able to discharge their duties effectively and efficiently, they are invested with broad powers. *E.g., Blair v. United States*, 250 U.S. 273, 282 (1919).

The courts have consistently rejected collateral challenges to grand jury investigations. For example, in *Blair*, a federal grand jury was empaneled to investigate possible violations of the Federal Corrupt Practices Act. Witnesses called before the grand jury refused to testify, claiming that the grand jury was without authority since the Act was unconstitutional. Holding that this collateral attack on the grand jury's authority was premature, this Court stated that an individual "is not entitled to challenge the authority of . . . the grand jury, provided they have a *de facto* existence and organization." 250 U.S. at 282 (emphasis added). Similarly, in *Calandra* the Court held that the Fourth Amendment exclusionary rule may not be invoked by a witness before a grand jury. The Court explained that "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." *Calandra*, 414 U.S. at 349. *See also United*

States v. Dionisio, 410 U.S. 1, 17 (1973) (impeding a grand jury's investigation "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws").

Furthermore, petitioner's claims are not ripe for consideration. Pursuant to the "case and controversy" limitation set forth in Article III of the Constitution, the federal courts have consistently held that they have no power to decide cases that are premature or not "ripe" for adjudication. *See, e.g., United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). As used in this context, ripeness requires in essence that a litigant attempting to invoke the power of a federal court present a claim that is sufficiently mature that "definite rights appear upon the one side and definite prejudicial interferences upon the other." 330 U.S. at 90 (footnote omitted). *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892). Because the pre-indictment claims raised by petitioner failed to satisfy that test, they were properly dismissed.

Thus, petitioner's actions were properly dismissed, not only as an illegitimate attempt to frustrate an ongoing criminal investigation, but also as a premature assertion of an unripe constitutional claim.

II. THE CASE DOES NOT MERIT REVIEW BY THIS COURT BECAUSE THE UNDERLYING SUBSTANTIVE ISSUE IN THE CASE HAS ALREADY BEEN RESOLVED IN ANOTHER PROCEEDING

Petitioner states that his complaints in the two underlying civil actions in this case sought judgments that "the independent counsel provisions of the Ethics in Government Act are unconstitutional" and that the Attorney General's parallel appointment was "rife with constitutional and statutory infirmities" (Pet. 3, 4). Because In-

dependent Counsel's investigation has now been upheld against petitioner's own identical constitutional challenge in a subsequent proceeding, the underlying merits of the instant case have been resolved, and have no claim upon the attention of this Court.

As noted earlier, petitioner refused to comply with a grand jury subpoena and challenged the authority of Independent Counsel to conduct his investigation. The district court upheld the authority of Independent Counsel to conduct the investigation, and the court of appeals affirmed. *In re Sealed Case*, Misc. No. 87-00139 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987). The court of appeals held that "Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1987, regardless of whether they also have this authority pursuant to their appointments under the Ethics Act." *Id.* at 62. A petition for a writ of certiorari to review this decision was denied by this Court on January 19, 1988. *North v. Walsh*, No. 87-869.[5]

In short, Independent Counsel's authority has been definitively upheld. Thus, even if this Court were to reverse the court of appeals in the instant case and rule that petitioner's claim should have been considered on the merits, the substantive relief that petitioner seeks will not be granted.[6] The power to measure the authority

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[5] On January 22, 1988, a divided panel of the court of appeals, in a case involving another Independent Counsel who had not accepted a parallel appointment from the Attorney General, held the Independent Counsel statute unconstitutional. *In re Sealed Case*, No. 87-8261 (D.C. Cir. Jan. 22, 1988). Even the panel majority in that case, however, expressly reaffirmed the validity of the Attorney General's appointment of Independent Counsel. *See* Slip op. at 17.

[6] Principles of res judicata also argue against this Court reviewing the decision of the court of appeals. The first Justice Harlan's oft-quoted summary of the doctrine states that "a right, question or fact distinctly put in issue and directly determined by a court

of government " 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), *quoting Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892). The requirement of a live controversy applies not only at the time when the complaint is filed, but at all stages of review as well. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). *See also Sosna v. Iowa*, 419 U.S. 393, 402 (1975) ("there must be a live controversy at the time this Court reviews the case.") The substance of this action having been determined by the courts, there is obviously no "real, earnest and vital" controversy here. Accordingly, the Court should decline to enter a dispute about this case's procedural underpinnings.

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of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies[.]" *Southern Pacific Ry. v. United States*, 168 U.S. 1, 48 (1897). Because the identical issue has been raised and resolved between the same two parties, there is no need for further review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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